

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TERRY F. LYBARGER

Claimant

VS.

BURGESS MANUFACTURING, INC.

Respondent

AND

KEMPER INSURANCE COMPANY

TIG INSURANCE COMPANY

Insurance Carriers

Docket No. 268,441

ORDER

Respondent and one of its insurance carriers, TIG Insurance Company (TIG) appeal from a preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish on April 23, 2003, which found claimant's current complaints related to his original series of accidental injuries that ended during TIG's period of coverage. Accordingly, Judge Frobish ordered medical treatment to be provided by respondent and TIG. Judge Frobish also designated Paul S. Stein, M.D., to be the authorized treating physician.

Issues

Claimant has been employed with respondent since 1971. The parties do not dispute that claimant suffered compensable upper extremities and cervical spine injuries with respondent during 2000 and 2001. Claimant was treated for bilateral carpal tunnel syndrome and bilateral ulnar nerve problems, including surgeries in April of 2000 by Dr. Mark Melhorn. Claimant was released to return to work on July 10, 2000, with the recommendation that he rotate his tasks. In May 2001, claimant started noticing symptoms again in his upper extremities, such as weakness in his arms, a loss of mobility in his wrists and shoulders and pain and numbness in his hands. Claimant returned to Dr. Melhorn.

His treatment included injections to claimant's thumb. Eventually claimant was seen by Dr. Jacob Amrani who diagnosed herniated disks at three levels of claimant's cervical spine. On June 19, 2002, Dr. Amrani performed cervical spine surgery on claimant. He was released to return to work with restrictions, but it appears the restrictions were removed in October of 2002.¹ Claimant continues to have symptoms which TIG alleges are the result of a new accident and injury.² The issues on appeal are whether claimant's current symptoms are work-related and, if so, whether claimant suffered one accident or two. Stated another way, the issue is whether claimant's current need for medical treatment is due to the natural and probable consequence of the accidental injury claimant suffered while working for respondent during TIG's period of coverage or whether, instead, claimant suffered a new accident and injury after September 6, 2002, and therefore during the period that respondent's insurance coverage was with a subsequent insurance carrier.³

Findings of Fact and Conclusions of Law

On an appeal from a preliminary hearing order, the Board is limited to review allegations that the ALJ exceeded his/her jurisdiction.⁴ The question regarding whether there was one accident at work or two and, as a result, which insurance carrier is liable for benefits does not raise one of the issues identified in K.S.A. 44-534a and does not otherwise constitute an allegation that the ALJ exceeded his jurisdiction.⁵

But TIG also alleges that the ALJ exceeded his jurisdiction by holding one of respondent's insurance carriers liable for claimant's ongoing medical treatment because TIG denies claimant's current complaints are due to a work-related injury. This gives rise to the jurisdictional issue of whether claimant's injury arose out of and in the course of his employment with respondent.⁶

¹ Lybarger Depo. at 16.

² TIG's period of coverage was September 6, 2000 through September 6, 2002. Before TIG, and commencing September 6, 1997, respondent's workers compensation insurance was with Kemper.

³ Respondent's insurance carrier or carriers for the period after September 6, 2002 was not present nor separately represented at the April 22, 2003 preliminary hearing.

⁴ K.S.A. 44-551.

⁵ See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999); *American States Ins. Co. v. Hanover Ins. Co.*, 14 Kan. App. 2d 492, 794 P.2d 662 (1990).

⁶ K.S.A. 44-534a(a)(2).

Claimant originally alleged repetitive use injuries to “both hands and arms” as a result of a series of accidents from “1989 to present.”⁷ The claim was subsequently amended to allege a series of accidents beginning September 7, 1997.⁸ Following bilateral carpal tunnel and ulnar nerve release surgeries in April 2000, claimant returned to work with respondent.

In June 2001 claimant began noticing symptoms in his neck. He returned to Dr. Melhorn on August 10, 2001. Eventually, claimant was referred to Dr. Amrani who diagnosed herniated disks at three levels of claimant’s cervical spine. By Order of April 5, 2002, Judge Frobish authorized Dr. Amrani to be claimant’s authorized treating physician. Judge Frobish further found claimant’s accident date fell within the coverage period of TIG.

Dr. Amrani performed surgery on claimant’s cervical spine on June 19, 2002. Claimant was released to return to work without restrictions on October 1, 2002. Before the surgery claimant had complained of hypersensitivity on his right side and numbness beneath his arm into his chest and back and down to his right foot and toes. Dr. Amrani initially believed the cervical surgery would relieve the symptoms. However, Dr. Amrani’s notes show that after the surgery claimant continued to have those symptoms. This suggested to Dr. Amrani that claimant’s right side and right lower extremity symptoms may not be related to the cervical spine condition.

Claimant attributes all his symptoms to his work activities with respondent. He reports no non-work accidents or activities which may have caused or contributed to his symptoms. But “[i]t is respondent and TIG’s position claimant suffered a new non-work-related injury which continues today.”⁹ Following a preliminary hearing on January 2, 2003, Judge Frobish ordered an independent medical evaluation by Dr. Paul S. Stein “for an opinion as to the cause of the Claimant’s hypersensitivity.”¹⁰ Dr. Stein relates claimant’s ongoing symptoms to his work-related cervical injury.

⁷ K-WC E-1 Application for Hearing (filed Aug. 17, 2001).

⁸ K-WC E-1 Application for Hearing (filed Sept. 6, 2001). The Division’s records show that Notice of claimant’s claim and Application for Hearing was sent to respondent, Hartford Accident & Indemnity Company, New York Underwriters Insurance Company, Northern Insurance Company of New York, American Protection Insurance Company and TIG Insurance Co.

⁹ Preliminary Hearing Appeal Brief of Respondent and Its Insurance Carrier, TIG Ins. Co. at 7 (filed June 12, 2003).

¹⁰ Order dated Jan. 3, 2003.

Mr. Lybarger had cervical myelopathy which was treated with surgery for decompression. He also has had bilateral carpal tunnel release. He had a good result from the surgeries except for two current complaints.

1. There is sensitivity to touch and dysesthetic feelings from the upper/middle thoracic area downward, greater on the right and greater distally. This was present from around October or November of 2001 and did not respond to the surgical decompression of the cervical spinal cord. These symptoms are from spinal cord injury due to the previous stenosis and are central (spinal cord rather than peripheral nerve) in origin. He does have a lumbar spondylolisthesis which does not generally produce this particular type of discomfort and certainly not at the thoracic levels.¹¹

The Board finds Dr. Stein's opinion persuasive and concludes that claimant's injuries arose out of and in the course of his employment with respondent. Once the compensability of the injury is decided, the question regarding whether or not claimant suffered a worsening or an aggravation of his injuries after TIG's period of coverage which would constitute a new accident under the Workers Compensation Act is not an issue that the Board has the jurisdiction to address on a appeal from a preliminary hearing order where that issue pertains only to a question concerning which of respondent's insurance carriers is liable for the payment of the preliminary benefits.

WHEREFORE, the preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish on April 23, 2003, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August 2003.

BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent and TIG Insurance Company
P. Kelly Donley, Attorney for Respondent and Kemper Insurance Company
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

¹¹ I.M.E. Follow Up Report at 2 (Feb. 21, 2003).

TERRY F. LYBARGER

5

DOCKET NO. 268,441